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EX PARTE OR LATE FILED

May 27, 1999

Rick Chessen, Esq.
Senior Legal Advisor to
Commissioner Gloria Tristani
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Re: CS Docket No. 98-120
Carriage of the Transmissions of Digital Television Broadcast Stations

Dear Rick:

Some time ago you asked how broadcasters square their positions on SHVA/Grade B contour and digital must-carry issues. The thrust of your inquiry was that in the SHVA context, broadcasters insist on the blackout of distant-station, same-network signals if a viewer can receive a local affiliate's signal by using an outdoor antenna. In the case of digital must-carry, however, broadcasters urge that cable systems be required to carry DTV signals even though subscribers could theoretically use an outdoor antenna to receive the signals. A similar question has now been raised in an April 28 *ex parte* submission by Time Warner Cable (CS Docket No. 98-120).

Consistent Positions. The simple truth is that broadcasters' positions in the SHVA Grade B debate and in the digital must-carry debate are consistent reactions to different harms remedied by different statutory provisions. At the most basic level, SHVA and the cable must-carry regime both try to safeguard the access (realistic access) of local communities to their local broadcast signals. But beyond this goal, the SHVA and cable must-carry legal frameworks diverge, as discussed further below. SHVA addresses intellectual property issues and uses the Grade B signal intensity standard to define legitimate expectations of copyright owners and licensees. It amended the Copyright Act to provide satellite carriers with a compulsory copyright license along the same lines that cable operators enjoyed, while recognizing the technical differences between satellite and cable and preserving the market for local broadcast signals. The must-carry provisions, by contrast, address competition issues. They amended the Communications Act to combat cable's anti-competitive restriction of access to local signals over cable.

In the SHVA context, broadcasters have argued that satellite carriers should not be permitted to infringe on broadcasters' intellectual property rights by delivering distant network signals to viewers that can receive the same-network local broadcast signals (as measured by the Grade B standard). The Grade B standard is simply not relevant to the must-carry debate. Broadcasters do not justify cable must-carry (analog or digital) on the grounds that viewers cannot receive broadcast signals over the air. Indeed, the cable compulsory license, unlike the satellite license, is premised on the notion that viewers *can* receive the signals over the air. Rather, broadcasters argue, and Congress has found, that must-carry is necessary because the cable industry has a history of preventing convenient access to broadcast signals over the air and over cable.

Genesis of Cable Carriage Provisions. In the cable context, Congress amassed and reviewed extensive documentation demonstrating that cable operators intentionally used their bottleneck power to squeeze out local stations. The compulsory copyright license granted to cable operators had permitted and encouraged cable to grow on the backs of broadcasters. The license was fashioned on the theory that cable provided local stations to households that could receive the same content without cable; that is, cable did not add content value or extend the reach of the local station's signal beyond the geographical area that station was already licensed to serve. Thus, it gave cable the right to carry local broadcast signals throughout the broadcaster's community of license. The must-carry rules were laid atop of the compulsory license when it became clear that cable had transformed from a mere transmission mode to a competing program provider – one with bottleneck control and anti-competitive practices that threatened local broadcast service.[1]

Congress found that the most effective solution was to impose must-carry requirements – requirements that withstood Supreme Court scrutiny – based on constitutionally valid rationales that also strongly support capacity-based must-carry requirements for digital signals. Thus, the must-carry requirements – in the analog and the digital context – are not premised on intellectual property protection or on the inadequacy of signal strength or antenna technology at subscriber households. Rather, they grow directly from the bottleneck control historically exercised by cable operators to anti-competitively exclude local broadcast service from subscriber households.

Genesis of Satellite Home Viewer Act Provisions. Unlike the cable compulsory license, the satellite compulsory license did not give carriers the right to "rebroadcast" local signals within the local broadcasters' service area – indeed, the technology did not permit satellite carriers to do this. Rather, the SHVA compulsory license permitted satellite carriers to provide broadcast network signals only to households that could not receive the same content

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[1] Cable operators decommissioned and dismantled homeowners' receiving antennas, thereby negating the public's access to local stations. Cable thus developed a subscriber base unwilling to rely on A/B switches and rooftop antennas, and at the same time endangered the public's broadcast service by discriminating against and refusing carriage to local stations.

without satellite. Congress properly determined that the Grade B signal intensity standard was necessary to define the limits of this license and preserve valuable intellectual property rights. [2] Satellite carriers' illegal delivery of distant network signals to homes that can receive the local affiliate over-the-air thus constitutes copyright infringement and theft of the signal. Congress did not try, as it did in the cable must-carry context, to remedy anti-competitive practices and bottleneck control. Unlike cable subscribers, new satellite subscribers by and large relied on over-the-air reception of local network signals or lifeline cable service, and viewed satellite as a supplemental programming service.

Efforts to make "apples-to-oranges" comparisons between the cable must-carry scheme and the SHVA compulsory license does not withstand close scrutiny and it is inappropriate for Time Warner or anybody else to select provisions or positions relating to the SHVA regulatory scheme and apply them, out of context, to the digital must-carry debate. The common denominator in both the satellite and cable contexts is that Congress and the FCC have upheld the longstanding principle that public policy requires spectrum to be set aside for localized television service. Satellite carriers and cable operators – given frequencies by the FCC and compulsory licenses by Congress – each were recognized as a potential threat to localism unless reasonable safeguards were enacted. Therefore, Congress and the FCC crafted limited and reasonable conditions on the use of these government-granted benefits to preserve the public's stake in effective local television service.

Respectfully submitted,

Jonathan D. Blake /epb

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Jennifer A. Johnson

cc: Magalie Roman Salas (CS Docket No. 98-120)
Kathryn Brown
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[2] Because the satellite technology did not support carriage of local signals, a blanket compulsory license to retransmit distant network signals to all satellite subscribers (regardless of their ability to receive local signals over the air) would have devastated local station service by permitting importation of distant network signals into the heart of local affiliates' markets. Satellite subscribers turning to distant signals for network service would be cut off from the valuable local services and information – including emergency information – provided by their local affiliates. Furthermore, viewers *not* subscribing to satellite or cable service would suffer a degradation of service as the viewer base supporting the local station – and the station's ability to generate advertising dollars – dwindled.